

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARIA DE LA O, et al.,
Plaintiffs,
v.
TOWN OF MATTAWA,
Defendant.

NO. CV-04-0192-EFS

ORDER GRANTING AND DENYING IN PART
PLAINTIFFS' MOTION TO DISMISS
DEFENDANT'S STATE LAW COUNTERCLAIMS
AND TO STRIKE DEFENDANT'S NOERR-
PENNINGTON OR FEDERAL LAW
COUNTERCLAIM, OR, IN THE
ALTERNATIVE, FOR A MORE DEFINITE
STATEMENT

MARIA FERNANDEZ, et al.,
Plaintiffs,
v.
TOWN OF MATTAWA,
Defendant.

NO. CV-05-0280-EFS

A telephonic hearing occurred in the above-captioned matters on February 3, 2009. *Maria De La O* Plaintiffs were represented by Kay Frank and Timothy Ford; *De La O* Plaintiffs were represented by Ty Duhamel. Jerry Moberg appeared on behalf of Defendant Town of Mattawa. Before the Court was Plaintiffs' Motion to Dismiss Defendant's State Law Counterclaims and to Strike Defendant's *Noerr-Pennington* or Federal Law

1 Counterclaim, or, in the Alternative, for a More Definite Statement.¹
 2 (Ct. Rec. 858.) Mattawa opposes the motion, submitting that it has valid
 3 counterclaims under RCW 4.24.510, RCW 4.24.350, and federal law. After
 4 reviewing the submitted material and relevant authority and hearing oral
 5 argument, the Court is fully informed. This Order memorializes and
 6 supplement's the Court's oral ruling; Plaintiffs' motion is granted (RCW
 7 4.24.510, RCW 4.24.350(2), and federal law) and denied (RCW 4.24.350(1))
 8 in part.

9 **A. Background**

10 *De La O* Plaintiffs filed their initial complaint on June 11, 2004.

11 (Ct. Rec. 1.) In relation to Mattawa, Plaintiffs alleged:

12 5.1 Defendant Esser caused the violations of plaintiffs'
 13 Fourth Amendment rights to occur and ratified them as the
 14 chief policymaking official of the Town of Mattawa.
 Those violations therefore resulted from and reflected
 the policies, customs and usages of the Town of Mattawa.

15 6.2 The above described actions of defendants Town of
 16 Mattawa, Esser, Blackburn, Jensen, Bumford, Coyne,
 Clawson, Vargas and Ditzel constitute a conspiracy to
 17 directly or indirectly cause the identified plaintiffs
 and others of their race and national origin to be
 18 deprived of the equal protection of the laws or of equal
 privileges and immunities under the laws, particularly
 19 the right to be free from unreasonable searches and
 seizures, rendering those defendants liable to the
 20 plaintiffs who were damaged thereby, pursuant to 42
 U.S.C. § 1985(3).

21 6.3 The above described actions of defendants Bumford, Coyne,
 Clawson, Vargas, Ditzel, Hoezee, Boness, Smith, Town of
 22 Mattawa, Esser, Blackburn, Jensen and Grant County caused
 the identified plaintiffs to be deprived of rights
 23 guaranteed by the Fourth and Fourteenth Amendments to the
 Constitution of the United States rendering those

25 ¹ Plaintiffs are not seeking dismissal of Mattawa's affirmative
 26 defenses at this time.

1 defendants liable to the plaintiffs whose rights they
 2 violated or caused to be violated pursuant to 42 U.S.C.
 § 1983.

3 A Second Amended Complaint, containing identical paragraphs 5.1, 6.2, and
 4 6.3, was filed on August 20, 2004. (Ct. Rec. 8.) Mattawa filed its
 5 answer on September 1, 2004 (Ct. Rec. 13), and then filed an amended
 6 answer on September 8, 2004, asserting counterclaims under RCW 4.24.350
 7 and RCW 4.24.510. (Ct. Rec. 13 p. 5 ¶ 14.)

8 *De La O* Plaintiffs amended their complaint again on April 28, 2005.
 9 (Ct. Rec. 21.) Paragraphs 5.1, 6.2, and 6.3 remained identical, absent
 10 capitalization of certain words. Mattawa answered on May 16, 2005,
 11 asserting the same two state law counterclaims. (Ct. Rec. 39.)

12 The *Fernandez* action was filed in this Court on September 13, 2005.
 13 (CV-05-280: Ct. Rec. 57.) This complaint alleges, in pertinent part:

140. Defendant Esser caused the violations of the plaintiffs'
 15 Fourth Amendment rights to occur and ratified them as the chief
 16 policymaking official of the Town of Mattawa. Those violations
 17 therefore resulted from and reflected the policies, customs,
 18 and usages of the Town of Mattawa.

145. The above described actions of the defendants Harden,
 15 Bumford, Clawson, Coyne, Vargas, Ditzel, Hoezee, Boness, Smith,
 16 Esser, Blackburn, Jensen, Town of Mattawa, and Grant County
 17 caused the individual plaintiffs to be deprived of rights
 18 guaranteed by the Fourth and Fourteenth Amendments to the
 19 United States Constitution rendering those defendants liable
 20 to the plaintiffs who were damaged thereby, pursuant to 42
 21 U.S.C. § 1983.

147. The above described actions of defendants Harden,
 15 Bumford, Clawson, Coyne, Vargas, Ditzel, Esser, Blackburn,
 16 Jensen, and Town of Mattawa constitute a conspiracy to directly
 17 or indirectly cause the individual plaintiffs and others of
 18 their race and national origin to be deprived of the equal
 19 protection of the laws or of equal privileges and immunities
 20 under the laws, particularly the right to be free from
 21 unreasonable searches and seizures, rendering those defendants
 22 liable to the plaintiffs who were damaged thereby, pursuant to
 23 42 U.S.C. § 1985(3).

1 The two (2) cases were consolidated for pretrial purposes on November 15,
 2 2005. (CV-05-280: Ct. Rec. 98.)

3 On September 25, 2006, the Court declared RCW 4.24.350(2)
 4 unconstitutional, but allowed Defendants to assert the following
 5 counterclaim under RCW 4.24.350(1):

6 These Defendants claim the protections and right of action
 7 granted by RCW 4.24.350(1), and that Plaintiffs have abused the
 8 civil process by knowingly and maliciously instituting claims
 9 in this action, which are both false and unfounded.

10 (Ct. Rec. 289 p. 13.) On December 20, 2006, the Court ruled that RCW
 11 74.15.030 and 74.15.080 and WAC 288-296-0520 are constitutionally
 12 overbroad. (Ct. Rec. 511.) The Court then granted Plaintiffs' Motion to
 13 Dismiss Defendant Town of Mattawa's Affirmative Defense and Counterclaim
 14 under RCW 4.24.510 (Ct. Rec. 391), due to Mattawa's failure to file an
 15 opposition, ruling that "Town of Mattawa's RCW 4.24.510 affirmative
 16 defense and counterclaim are dismissed." (Ct. Rec. 517 p. 2.)

17 State and Mattawa Defendants appealed the Court's rulings regarding
 18 the state statutes' and regulation's constitutionality, but did not
 19 seek relief from the dismissal of the RCW 4.24.510 counterclaim. (Ct.
 20 Recs. 566 & 568.) Thereafter, Plaintiffs agreed to dismiss all claims
 21 against the individual Mattawa Defendants. (Ct. Rec. 720.) The Court
 22 agreed to this stipulated dismissal on June 5, 2007, thereby mooted the
 23 pending appeal. (Ct. Rec. 741.)

24 The parties in their stipulation and related submissions (Ct. Rec.
 25 693, 710, & 720) recognized that Plaintiffs could pursue their 42 U.S.C.
 26 §§ 1983 and 1985(3) claims against Mattawa, and that Plaintiffs could
 file the proposed amended complaints. (Ct. Recs. 692 & 696.) These
 proposed amended complaints slightly altered paragraphs 5.1, 6.2, & 6.3

1 in *De La O* and paragraphs 140, 145, and 147 in *Fernandez*. On June 1,
 2 2007, the Court granted *De La O* Plaintiffs leave to file the proposed
 3 amended complaints. (Ct. Rec. 741.)

4 Thereafter, the State Defendants and Plaintiffs settled their
 5 claims. (Ct. Rec. 798.) The Court determined that the settlement was
 6 reasonable and agreed as part of the settlement to vacate the Court's
 7 prior orders declaring RCW 4.24.350(2) and other state statutes and
 8 regulations unconstitutional. (Ct. Rec. 832.)

9 Due to an oversight, Plaintiffs did not file their allowed amended
 10 complaints until December 2, 2008. (Ct. Recs. 852 & 853.) These
 11 complaints are identical to the previously-proposed complaints. Mattawa
 12 filed its answers on December 15, 2008, asserting counterclaims under RCW
 13 4.24.350, RCW 4.24.510, and federal law. (Ct. Recs. 855 & 856.)

14 **B. Authority and Analysis**

15 **1. RCW 4.24.510**

16 The Court's January 3, 2007 dismissal of Mattawa's RCW 4.24.510²
 17 counterclaim is not impacted by the subsequent stipulated dismissals or
 18 Court's Orders. The Court dismissed this counterclaim because Mattawa

20 ² RCW 4.24.510 states:

21 A person who communicates a complaint or information to any
 22 branch or agency of federal, state, or local government . . .
 23 is immune from civil liability for claims based upon the
 24 communication to the agency or organization regarding any
 25 matter reasonably of concern to that agency or organization.
 26 A person prevailing upon the defense provided for in this
 section is entitled to recover expenses and reasonable
 attorneys' fees incurred in establishing the defense and in
 addition shall receive statutory damages of ten thousand
 dollars. Statutory damages may be denied if the court finds
 that the complaint or information was communicated in bad
 faith.

1 failed to respond to Plaintiffs' Motion to Dismiss Defendant Town of
 2 Mattawa's Affirmative Defense and Counterclaim under RCW 4.24.510 (Ct.
 3 Rec. 391). (Ct. Rec. 517 p. 2.) Given Mattawa's decision not to
 4 respond to the dismissal motion and decision not to appeal the dismissal
 5 Order, the Court will not revisit its dismissal Order because Plaintiffs
 6 relied upon this ruling. Accordingly, the Court grants Plaintiffs'
 7 motion in part - Mattawa's RCW 4.24.510 counterclaim is dismissed.

8 **2. RCW 4.24.350**

9 Although the Court previously ruled that RCW 4.24.350(2) is
 10 unconstitutional, the Court vacated this ruling as a condition of
 11 Plaintiffs' and State Defendants' stipulated dismissal. The Court need
 12 not readdress RCW 4.24.350(2)'s constitutionality because subsection (2)
 13 does not apply to a municipality:

14 (2) In any action, claim, or counterclaim brought by a *judicial*
 15 *officer, prosecuting authority, or law enforcement officer* for
 16 malicious prosecution arising out of the performance or
 17 purported performance of the public duty of such officer, an
 18 arrest or seizure of property need not be an element of the
 19 claim, nor do special damages need to be proved. A judicial
 20 officer, prosecuting authority, or law enforcement officer
 21 prevailing in such an action may be allowed an amount up to one
 thousand dollars as liquidated damages, together with a
 reasonable attorneys' fee, and other costs of suit. A government entity which has provided legal services to the
 prevailing judicial officer, prosecuting authority, or law
 enforcement officer has reimbursement rights to any award for
 reasonable attorneys' fees and other costs, but shall have no
 such rights to any liquidated damages allowed.

22 (Emphasis added.) Subsection (4) provides the following definitions:

23 (a) "Judicial officer" means a justice, judge, magistrate, or
 24 other judicial officer of the state or a city, town, or county.

25 (b) "Prosecuting authority" means any officer or employee of
 26 the state or a city, town, or county who is authorized by law
 to initiate a criminal or civil proceeding on behalf of the
 public.

1 (c) "Law enforcement officer" means a member of the state
 2 patrol, a sheriff or deputy sheriff, or a member of the police
 3 force of a city, town, university, state college, or port
 4 district, or a fish and wildlife officer or ex officio fish and
 5 wildlife officer as defined in RCW 77.08.010.

6 These terms' definitions make clear that subsection (2) does not apply
 7 to a city or town. Accordingly, Mattawa cannot take advantage of RCW
 8 4.24.350(2) - even if constitutional.

9 The Court previously recognized that Defendants could pursue a
 10 counterclaim under subsection (1)³. The Court abides by this ruling,
 11 which has not been effected by the stipulated dismissals, and allows
 12 Mattawa to pursue a counterclaim under RCW 4.24.350(1).

13 Accordingly, Plaintiffs' motion is granted (RCW 4.24.350(2)) and
 14 denied (RCW 4.24.350(1)) in part.

15 **3. Federal Law**

16 In its December 2008 amended answers, Mattawa claims it "is immune
 17 from liability for communications its made in good faith governmental
 18 agencies and are entitled to statutory damages, fees, and costs pursuant
 19 to RCW 4.24.510 and *under federal law.*" (Emphasis added.) In its
 20

21 ³ Subsection (1) states:

22 In any action for damages, whether based on tort or contract
 23 or otherwise, a claim or counterclaim for damages may be
 24 litigated in the principal action for malicious prosecution on
 25 the ground that the action was instituted with knowledge that
 26 the same was false, and unfounded, malicious and without
 probable cause in the filing of such action, or that the same
 was filed as a part of a conspiracy to misuse judicial process
 by filing an action known to be false and unfounded.

RCW 4.24.350(1).

ORDER ~ 7

1 response, Mattawa clarifies that it is relying upon the federal *Noerr*⁴-
 2 *Pennington*⁵ doctrine as a basis for the federal counterclaim.

3 Under the *Noerr-Pennington* doctrine, “[t]hose who petition
 4 government for redress are generally immune from antitrust liability.”
 5 *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, , ,
 6 508 U.S. 49, 56 (1993). The *Noerr-Pennington* doctrine is a recognized
 7 defense in §§ 1983 and 1985 actions based on petitioning of public
 8 authorities and can be utilized by a government entity. *Manistee Town*
 9 *Center v. City of Glendale*, 227 F.3d 1090, 1092-93 (9th Cir. 2000).
 10 However, the cases do not recognize a *Noerr-Pennington* counterclaim.

11 *Kearney v. Foley and Lardner*, 553 F. Supp. 2d 1178 (S.D. Cal. 2008),
 12 does not support Mattawa's argument that there is a *Noerr-Pennington*
 13 counterclaim. The district court in *Kearney* held that the defendant was
 14 entitled to attorney fees and costs under the California anti-SLAPP⁶
 15 statute for its time associated with responding to both state and federal
 16 claims premised on defendants' actions and communications during the
 17 underlying eminent domain process and condemnation action - a common
 18 factual scenario. *Kearney* did not recognize a *Noerr-Pennington*
 19 counterclaim.

20 Therefore, the Court grants Plaintiffs' motion to strike the federal
 21 *Noerr-Pennington* counterclaim. Plaintiffs' alternative request for a

22 ⁴ *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127
 23 (1961) (“*Noerr*”).

24 ⁵ *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965)
 25 (“*Pennington*”).

26 ⁶ SLAPP = Strategic lawsuit against public participation.

1 more definite statement under Federal Rule of Civil Procedure 12(e) is
2 moot.

3 **C. Conclusion**

4 For the reasons given above, **IT IS HEREBY ORDERED:** Plaintiffs'
5 Motion to Dismiss Defendant's State Law Counterclaims and to Strike
6 Defendant's *Noerr-Pennington* or Federal Law Counterclaim, or, in the
7 Alternative, for a More Definite Statement (**Ct. Rec. 858**) is **GRANTED** (RCW
8 4.24.510, RCW 4.24.350(2), and federal law) **and DENIED** (RCW 4.24.350(1))
9 **IN PART.**

10 **IT IS SO ORDERED.** The District Court Executive is directed to enter
11 this Order and provide copies to counsel.

12 **DATED** this 3rd day of February 2009.

13
14

S/ Edward F. Shea
15 EDWARD F. SHEA
United States District Judge

16 Q:\Civil\2004\0192.dism.countercl.2009.wpd
17
18
19
20
21
22
23
24
25
26